

**STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD**

In re: Application of Kindred Healthcare, Inc.)	
Internal Corporate Reorganization)	GMCB-002-18con
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STATEMENT OF DECISION AND ORDER

Introduction

In this Decision and Order, we consider Kindred Healthcare, Inc.’s (Kindred, or the applicant) application for a certificate of need (CON) for a proposed internal restructuring in connection with a \$4.1 billion corporate merger scheduled to close in the summer of 2018.

For the reasons set forth below, we approve the application and issue the applicant a CON, also on this date, subject to the conditions set forth therein.

Procedural Background

Kindred currently operates two licensed Skilled Nursing Facilities (SNFs) in Vermont: Birchwood Terrace and Starr Farm Nursing Center. Both facilities are in the process of being sold to unrelated third parties, and a CON application for the purchase of Birchwood Terrace (Docket No. GMCB-014-17con) is pending before the Board.

On December 19, 2017, Kindred announced a merger agreement under which a group of purchasers will acquire all of Kindred’s stock and separate its homecare businesses from its specialty hospital businesses—including its Vermont SNFs—and operate the separate lines of business under newly-formed corporate entities.

On January 25, 2018, Kindred submitted a request to the Board for a jurisdictional determination as to its corporate restructuring plan. On January 30, 2018, the Department of Disabilities, Aging, and Independent Living (DAIL), the primary regulator of SNFs in Vermont, advised the applicant that the proposed restructuring would require a new license application for Birchwood Terrace. The Board asserted CON jurisdiction on February 7, 2018.

On March 5, 2018, Kindred filed the instant CON application and requested expedited review. On March 7, 2018, the Board posted public notice to its website. Having received no requests for interested party or Amicus Curiae status, the Board granted expedited review on April 2, 2018.

On March 16, 2018, the Board asked the applicant to provide additional or clarifying information to assist with its review. Kindred responded to the Board’s request on April 13, 2018, and on April 16, 2018, the Board closed the application.

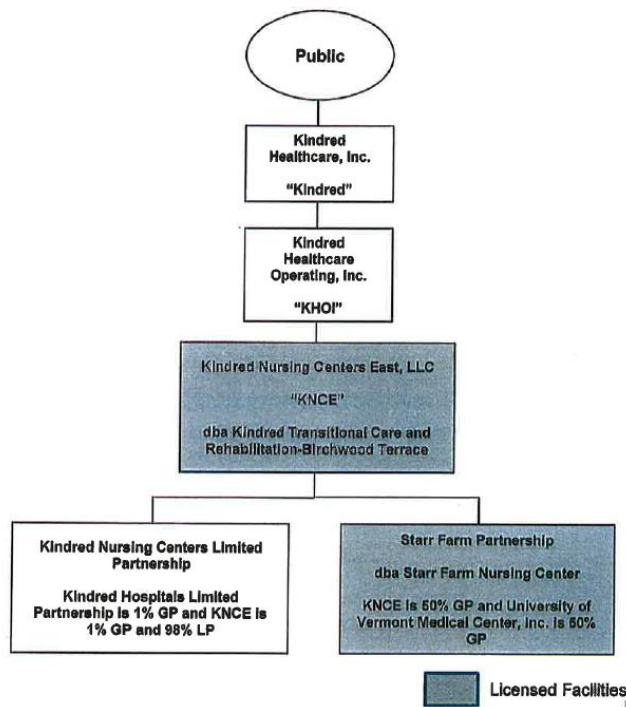
Jurisdiction

The Board has jurisdiction over this matter pursuant to 18 V.S.A. § 9375(b)(8) (Board shall review, approve, approve with conditions or deny CON applications) and GMCB Rule 4.000, § 4.203(2) (CON review triggered by change in ownership, corporate structure, or other organizational modification that requires a new license).

Findings of Fact

1. Kindred is a publicly-traded national healthcare services company based in Louisville, Kentucky. Kindred operates two SNFs in Burlington, Vermont: Kindred Transitional Care and Rehabilitation - Birchwood Terrace (Birchwood Terrace) and Starr Farm. Both facilities are in the process of being sold to unrelated third parties. Application (App.) at 1. Kindred does not operate any home health agencies, hospices, rehabilitation centers or hospitals in Vermont. App. at 2.

2. Kindred currently owns the Vermont facilities through a series of corporate subsidiaries. The ownership structure is depicted in the following diagram:



App. Attachment B.

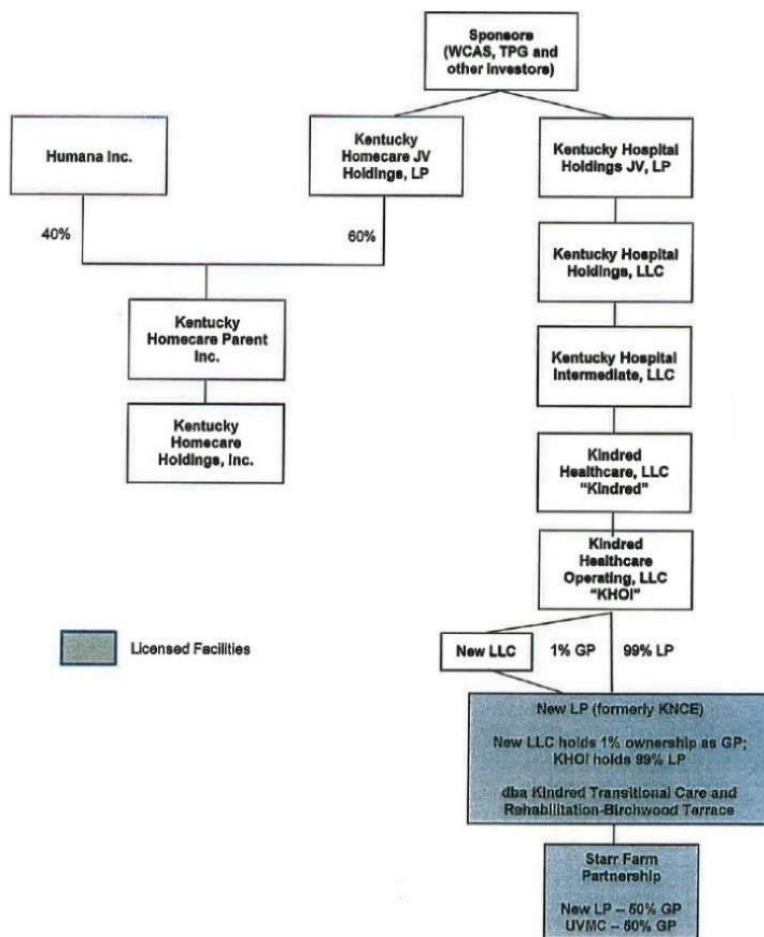
3. Pursuant to a corporate merger and acquisition agreement (agreement) expected to close in the summer of 2018, the applicant will transfer all of Kindred's issued and outstanding common stock, valued at approximately \$ 4.1 billion, to a group of purchasers that include affiliates of TPG Capital (TPG), Welsh, Carson, Anderson & Stowe (WCAS), and Humana Inc. (collectively, the Purchasers). App. at 2; Letter from Jeffrey Stodghill, Vice President and Corporate Counsel, Kindred Healthcare (Jan. 24, 2018) at 1; Press Release, Kindred Healthcare,

Kindred Healthcare to be Acquired by TPG Capital, Welsh, Carson, Anderson & Stowe and Humana Inc. for \$9.00 per Share in Cash (Dec. 19, 2017).

4. Under the agreement, the Purchasers will separate Kindred's homecare business that includes its home health, hospice and community care services, from its specialty hospital business that includes its long term acute care hospital, inpatient rehabilitation, and contract rehabilitation services. App. at 2. This will allow the Purchasers to own shares in the homecare and specialty hospital businesses in different proportions. *Id.* at 3.

5. The Purchasers will own the homecare business under a newly-formed entity called "Kentucky Homecare Parent, Inc." Affiliates of TPG, WCAS and other minority investors will own the specialty hospital business under a separate newly-formed entity called "Kentucky Hospital Holdings, LLC." If either of Kindred's Vermont SNFs are not sold prior to closing, they will be held by Kentucky Hospital Holdings, LLC. *Id.* at 2; Attachment A at 77-78.

6. To effectively separate the businesses, the Purchasers will implement a level of internal restructuring which will convert the corporate subsidiaries within the specialty hospital business to limited liability companies (LLCs), as shown below:



Id., App. Attachment B.

7. The Purchasers' objective in converting the specialty hospital businesses to LLCs is to reduce the income tax consequences of the separation. By making most of the entities owning specialty hospital assets more fiscally transparent, the Purchasers will obtain flexibility to subject a portion of future hospital earnings to only one level of income taxation. App. at 3.

8. Following the restructuring, Birchwood Terrace and Starr Farm will continue to operate as stand-alone, Vermont-licensed SNFs, providing the same services with no changes in the number of licensed beds, management, or operations. *Id.*

9. The merger and reorganization will not alter the legal liability of Birchwood Terrace and Starr Farm or affect their fiscal stability. The direct parent of the licensed entities, Kindred Healthcare Operating, LLC (KHOI), will also remain the same. *Id.*

10. Following the restructuring, Kindred Healthcare Inc. will remain the 100% direct parent of KHOI, and its balance sheet will remain substantially unchanged. App. at 3-4, Attachment D.

11. On March 23, 2018, DAIL provided the Board with a conditional letter of support for the application, noting that there will be no changes to operations at Kindred's Vermont SNF facilities. Letter from Monica Hutt, DAIL Commissioner (March 23, 2018).

12. All costs associated with the acquisition, merger, and subsequent restructuring will be borne by the Purchasers. App. at 2.

Standard of Review

Vermont's CON process is governed by 18 V.S.A. §§ 9431-9446 and GMCB Rule 4.000 (Certificate of Need). An applicant bears the burden to demonstrate that each criterion set forth in 18 V.S.A. § 9437 is met. GMCB Rule 4.000, § 4.302 (3); *In re Central Vermont Medical Center*, 174 Vt. 607, 611 (2002).

Conclusions of Law

Under the first statutory criterion, the applicant must show that the application is consistent with the health resource allocation plan (HRAP), which identifies needs in Vermont's health care system, resources to address those needs, and priorities for addressing them on a statewide basis. 18 V.S.A. § 9437(1).

Two HRAP standards apply to this application. Under Standard 5.3, nursing homes and similar entities must provide a written recommendation from DAIL. The applicant has fulfilled this standard. *See* Findings of Fact (Findings) ¶ 11. Under Standard 5.12, an applicant seeking to restructure nursing home ownership in a manner that triggers the need for a new license must demonstrate that it can meet all reasonably anticipated financial and quality obligations. Here, the proposed restructuring will not alter the finances or quality obligations of the applicant's Vermont facilities. *See* Findings ¶¶ 8, 9, 12. We therefore conclude that the applicant has satisfied the first criterion.

Under the second criterion, an applicant must demonstrate that the project cost is reasonable because first, the applicant can sustain any financial burden likely to result from the project's completion; second, the project will not cause an "undue" increase in the costs of care, and third, "less expensive alternatives do not exist, would be unsatisfactory, or are not feasible or appropriate." 18 V.S.A. § 9437(2). In determining whether the project will unduly increase the costs of care, the Board must consider factors that include the financial impact on the facility's services, expenditures and charges, and whether such impact is outweighed by the project's benefits to the public. 18 V.S.A. § 9437(2)(B).

Since the applicant's Vermont SNFs represent a small slice of a \$4.1 billion corporate merger and acquisition financed by outside investors, *see* Findings ¶¶ 3, 12, our inquiry is focused on whether the proposed corporate restructuring will cause an undue increase in the costs of care. For several reasons, we conclude that it will not.

First, neither the merger nor the proposed restructuring will alter the services provided at Birchwood Terrace and Starr Farm. They will continue to operate as stand-alone licensed SNFs with no changes in the number of licensed beds, management, or operations. Finding ¶ 8. Although the Purchasers will separate the applicant's homecare and specialty hospital businesses in the transaction, the Vermont SNFs will retain their respective parent companies. Findings ¶¶ 4, 9, 10. The finances of those parent companies will remain substantially unchanged following the restructuring, as will those of Birchwood Terrace and Starr Farm. Findings ¶¶ 9, 10. Finally, the conversion of Kindred's corporate subsidiaries to LLCs for tax purposes will not affect the liability of its Vermont facilities. Findings ¶¶ 7, 9. The applicant has therefore met the second criterion.

The third and fourth criteria examine whether there is an identifiable, existing, or reasonably anticipated need for the proposed project, and whether it will improve the quality of health care in Vermont, provide greater access to health care for Vermonters, or both. 18 V.S.A. § 9437(3), (4). While these concepts are not defined by rule, our CON statute explains that the policy and purpose underlying the law is to ensure, among other things, that health care projects are developed in a manner that maintains and improves the quality and access to health care services. 18 V.S.A. § 9431(a). As DAIL noted in its letter of support for the application, the applicant's Vermont SNFs will continue to operate as they do now following the proposed merger and restructuring with no changes to operations. Finding ¶ 11. Thus, to the extent that that the third and fourth criteria are applicable, we conclude they have been satisfied.

We further conclude that the proposed merger and restructuring will not have an undue adverse impact on other services offered by Kindred's Vermont SNFs. 18 V.S.A. § 9737(5). The restructuring is intended to allow the Purchasers to invest in Kindred's homecare and specialty hospital lines of business in different proportions and to obtain more favorable tax treatment. Findings ¶¶ 4, 7. It will not impact the number of licensed beds, management, or operations at the Vermont facilities. Findings ¶ 8. The applicant has thus satisfied the fifth criterion as well.

The sixth statutory criterion, that the applicant show that the project will "serve the public good," 18 V.S.A. § 9437(6), has been met for all of the reasons discussed in this decision. Additionally, because there will be no change to the location of services, and therefore no change

in the availability of transportation to Birchwood Terrace and Starr Farm, the seventh criterion has been satisfied as well. *See* 18 V.S.A. § 9437(7) (applicant must consider availability of transportation services).

Last, the applicant must demonstrate that the purchase of new health information technology (HIT) conforms to the State's health information technology plan. 18 V.S.A. § 9437(8). As the proposed merger and reorganization will not affect the HIT systems of Kindred's Vermont SNFs, we conclude that this criterion is inapplicable.

Conclusion

Based on the above, we conclude that the applicant has demonstrated that it has met each required statutory criterion under 18 V.S.A. § 9437. We therefore approve the application and issue a certificate of need, subject to the conditions outlined therein.

SO ORDERED.

Dated: April 23, 2018 at Montpelier, Vermont.

s/ Kevin Mullin, Chair)

s/ Jessica Holmes)

s/ Robin Lunge)

s/ Tom Pelham)

s/ Maureen Usifer)

GREEN MOUNTAIN
CARE BOARD
OF VERMONT

Filed: April 23, 2018

Attest: s/ Erin Collier, Administrative Services Coordinator